Supreme Court, U.S.
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No. 95-868

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JOSEPH W. DARLAK,
Petitioner,

v.

COLUMBUS-AMERICA DISCOVERY GROUP, and
THOMAS G. THOMPSON,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1. Did the court of appeals err in finding on the particular facts of this case that petitioner was precluded from relitigating issues identical to those determined in prior litigation where petitioner (i) was offered but declined an opportunity to intervene in the prior litigation and (ii) had a contractual agreement with a party to the litigation from whom his own claims derived to participate in the case?

LIST OF PARTIES

The parties to this case are petitioner Joseph W. Darlak and respondents Columbus-America Discovery Group and Thomas G. Thompson. The Trustees of Columbia University were defendants in the case below, but were dismissed by stipulation and order in the district court. Pursuant to Supreme Court Rule 29.6, the Court is advised that respondent Columbus-America Discovery Group has no parent companies or subsidiaries that are not wholly owned.

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RESPONDENTS' BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

Even if the unsupported and outright untrue assertions in the petition were left uncorrected, the fact-bound decision below would present no issue meriting review. Viewed in light of the actual record below, denial of the petition is even more plainly appropriate.

This is the third petition for certiorari this Term involving the celebrated shipwreck SS CENTRAL AMERICA. Respondent Columbus-America Discovery Group ("Columbus-America") invested enormous effort and expense in recovering antique gold and other artifacts from the 1857 shipwreck, which is over 160 miles from

shore in water one and a half miles deep. Part of Columbus-America's reward for this feat has been a proliferation of claimants seeking to help themselves to the treasure once Columbus-America got it ashore. As the Fourth Circuit aptly stated in a 1991 opinion affirming summary judgment against yet another party who (like Darlak) claimed credit for finding the SS CENTRAL AMERICA: "There is gold beneath the ocean, while above ground there are men who covet it." *Standefer v. Thompson*, 939 F.2d 161, 162 (4th Cir. 1991).

Much of the focus in the SS CENTRAL AMERICA litigation has been on claims to the antique gold brought by a group of insurance companies that allegedly insured the treasure in 1857. That case arose as an *in rem* action filed by Columbus-America to establish title to the shipwreck. This Court recently denied certiorari following decisions by the district court and court of appeals in that case granting Columbus-America a 90% salvage award and resolving other issues. *See Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 56 F.3d 556 (4th Cir.), *cert. denied*, 116 S. Ct. 352 (1995) (No. 95-415).[1] For convenience, that litigation will be referred to in this brief as the "Admiralty Action."

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[1] The court of appeals discussed at length the magnitude of Columbus-America's achievement and the responsible manner in which it had served the public's interest. For instance, the appellate court noted that the recovery effort here was unparalleled, and that Columbus-America's "efforts to preserve the site and artifacts have not been equaled in any other case." 56 F.3d at 573. Columbus-America has also produced educational and other materials on the project to benefit the public. *Id.* The court of appeals concluded: "In short, we cannot imagine anyone demonstrating more diligence, skill, and energy than Columbus-America has shown here. Its efforts provide a standard against which all others should be judged." *Id.* at 572.

More significant for this petition, the district court and court of appeals in the Admiralty Action also addressed and rejected claims made by intervenors Jack F. Grimm and Joanne Lampe Charlton, personal representative of the estate of Harry G. John ("Grimm and John"). Grimm and John alleged that Columbus-America had misappropriated certain search data from a Columbia University sonar survey (the "Columbia Data"), and used the Data to locate the SS CENTRAL AMERICA. Grimm and John claimed an interest in the survey because they had commissioned it.

Both the district court and the court of appeals rejected the claims of Grimm and John in their entirety, finding that Columbus-America made no use of the Columbia Data in locating the SS CENTRAL AMERICA, and that Grimm and John had no proprietary interest in the Data in the first place. *See* 56 F.3d at 565-68. This Court denied Grimm and John's separate petition for certiorari on those issues last month. *See* 64 U.S.L.W. 3378 (U.S. November 27, 1995) (No. 95-640).

Here, petitioner Darlak asserts in a separate suit claims deriving entirely from those earlier asserted by Grimm and John — that Columbus-America used the Columbia Data to find the SS CENTRAL AMERICA. Darlak's claims are based on his participation in the 1984 Columbia survey as an employee of Grimm and John, who commissioned the survey.[2] The Columbia survey located a target near (but not at) the site where Columbus-

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[2] Darlak has consistently objected to the term "employee" as a description of his relationship with Grimm and John. Darlak stated in his deposition that he could not be their employee because he was "employed ... by the Heavenly Father as a minister," but that he could be a "project consultant." There is no indication in the record that this is a distinction of legal significance.

America eventually found the SS CENTRAL AMERICA. It is this target information that Grimm and John in the Admiralty Action claimed Columbus-America had misappropriated to help it find the shipwreck. Darlak now claims that he is the person who told Columbia where to search when it conducted the survey.[3]

The court of appeals found that this derivative claim was barred because its merits had been litigated and decided in the Admiralty Action. Pet. App. 7a-9a. Darlak was on notice and had ample opportunity to intervene in this *in rem* action, knowing full well that its whole purpose was to adjudicate claims against the shipwreck as to the whole world. Instead, he declined to intervene in favor of having his interests represented by Grimm and John. *Id.* The district court had rejected Darlak's claims on grounds that undisputed evidence established they were simply not true. Pet. App. 10a-23a. An accurate summary of some of the litigation history makes plain the correctness of both these highly factual alternative grounds for decision.

Columbus-America initially filed the Admiralty Action *in rem* in the United States District Court for the Eastern District of Virginia to establish its claim to ownership or a salvage award for locating and recovering the SS CENTRAL AMERICA. In September, 1989, Columbus-America published a Notice of Complaint and Arrest

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[3] Compelling evidence of the motivation for and legitimacy of these claims is given by Darlak's similar unsupported proclamation that he, and not world-renowned oceanographer Dr. Robert Ballard, should be hailed as the true discoverer of the HMS TITANIC shipwreck, if only a cable hadn't snagged. *See* Pet. 7. The thrust of Darlak's petition — devoid throughout of any citation to the record or actual court findings — is that the "wrong oceanographer" got credit for finding the SS CENTRAL AMERICA. Among the many contrary facts actually established in the record below, the court of appeals noted that Darlak is "not an oceanographer." Pet. App. 3a.

pursuant to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure. *See* 742 F. Supp. at 1332; 974 F.2d at 469 n.10. In response to the Notice, nearly 40 insurance companies filed claims in the district court asserting that they had insured and paid claims on a certain publicly reported commercial shipment of gold onboard the SS CENTRAL AMERICA and thereby became owners of that gold. *See* 974 F.2d at 458. Extensive discovery followed, and the trial was scheduled to begin on April 3, 1990. *Id.*

On March 29, 1990, three days before trial, Grimm and John moved to intervene in the Admiralty Action.[4] Two days later, on April 2, 1990, Columbia University (which had conducted the 1984 sonar survey) also moved to intervene. These intervenors in the *in rem* proceeding, just like Darlak here, asserted that Columbus-America had used the Columbia Data to locate the SS CENTRAL AMERICA and that they were entitled to a share of any recovery as a result.

The district court allowed the interventions, provided that the intervenors agreed to proceed to trial as previously scheduled. *See* 974 F.2d at 459. Petitioner

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[4] A few days earlier, Grimm and John had re-acquired rights to the Columbia Data from a Catholic monastic order, the Province of St. Joseph of the Capuchin Order-St. Benedict Friary of Milwaukee. Santa Fe Communications (Grimm and John's company) had given its rights in the Columbia Data to the monks in 1984, labelling them "worthless." John (who had been president of Santa Fe until he was judicially removed for fraud, breach of fiduciary duty, and other misconduct) and Grimm paid $10 to the monks for these rights, not disclosing that they intended to use them to assert a claim in the pending *in rem* proceeding. When they were found out, Grimm and John cut the monks back in for a one-third share of any proceeds from their lawsuit. *See* 974 F.2d at 457-59. These facts are pertinent here because Darlak's claims against Columbus-America are entirely derivative of the claims of Grimm and John.

Darlak was present in the courtroom on April 3, 1990 when the intervention motions were argued and granted in the *in rem* case. Darlak was represented by counsel, and was prepared to intervene. Instead, however, he chose to enter into a written agreement with his employers Grimm and John, pursuant to which he promised not to intervene.

That written agreement stated that "Darlak is prepared to intervene," and referred to attached pleadings that Darlak had already prepared for this purpose. The agreement provided that, instead of intervening, Darlak would "cooperate with the efforts of Grimm-John to establish their rights vis-a-vis Columbia, Columbus-America Discovery Group, Inc. and the wreck of the Central-America." Darlak's contract with Grimm and John also stated as follows: "The parties agree that in consideration of Darlak not seeking to intervene . . . Grimm-John agree not to assert in any subsequent proceeding any theory of claim preclusion, including collateral estoppel . . ." *See* Pet. App. 4a-6a.

The district court conducted a 10-day trial of the Admiralty Action in April, 1990. The court heard numerous live witnesses and reviewed hundreds of exhibits. *See* 974 F.2d at 459. The district court found that Grimm and John would, at a minimum, have to show that Columbus-America used the Columbia Data and that the Data assisted it in locating the SS CENTRAL AMERICA in order to support their claim. The District Court concluded that Grimm and John totally failed to meet this burden. Specifically, the district court held that Grimm and John "failed to establish (1) that they furnished information that assisted or could have assisted in the location of the Central America; (2) that plaintiff and/or Thompson used [the Columbia Data]." *See* 742 F. Supp. at 1341.

On appeal of this aspect of the district court's findings in the Admiralty Action, the Fourth Circuit reversed, holding that Grimm and John should have been given a greater opportunity for discovery prior to trial following their intervention. *See* 974 F.2d at 469. On remand, extensive additional discovery was taken on the same issues — whether Columbus-America had made any use of the Columbia Data, and if so, whether that use contributed to the finding of the SS CENTRAL AMERICA. Total discovery included 46 days of depositions and production of over 40 bankers' boxes of documents from Columbus-America. *See* Mem. op. at 3 (E.D. Va. November 18, 1993) (unpublished opinion).[5]

On September 4, 1990, two weeks after the district court issued its decision on the merits dismissing the claims of Grimm and John, Darlak filed the instant action against Columbia University and respondents Columbus-America and Thomas G. Thompson in the United States District Court for the Southern District of New York. Pet. App. 5a. In December, 1992, the action was transferred by agreement of the parties to the Eastern District of Virginia, where the Admiralty Action was pending on remand. Darlak's claims against Columbia were later dismissed with prejudice. *Id.*

The district court conducted a new trial in the *in rem* case, with 10 additional days of testimony from 25 witnesses and hundreds of additional exhibits. As in 1990, Darlak was fully aware of the Admiralty Action and made his own choices as to how he would participate. In

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[5] Darlak had access to this massive discovery from the Admiralty Action, refuting his complaints in the petition that he was denied sufficient discovery in his own lawsuit. *See* Pet. 27. In any event, the district judge's handling of discovery matters under an abuse of discretion standard is hardly a matter for certiorari review.

apparent violation of his agreement with Grimm and John, Darlak initially filed a motion to intervene prior to the second trial in the Admiralty Action. Columbus-America did not oppose Darlak's motion to intervene. Later, however, Darlak withdrew his motion to intervene, asserting that he would intervene in the Admiralty Action only if the judge would agree to consolidate the trial of that action with his separate 15-count *in personam* action. *See* Pet. App. 5a-6a. That conditional motion was denied, and Darlak did not appeal that decision. Pet. App. 6a.

In the second trial on Grimm and John's claims, the district court again expressly found that Columbus-America had made no use of the Columbia Data in locating the SS CENTRAL AMERICA. The court also expressly found that the Columbia Data would not have been of assistance even if Columbus-America had used it. The district court made extensive factual findings in an 80-page opinion to support this conclusion. *See* Mem. op. at 11-19, 43-63 (E.D. Va. November 18, 1993).

With respect to whether Columbus-America used the Columbia Data in finding the SS CENTRAL AMERICA — a key fact without which Darlak's claims necessarily fail, the district court found:

> Not only is there a lack of evidence, factual or circumstantial, to show CADG made use of or that the Columbia data assisted it in locating the CENTRAL AMERICA, but the evidence also clearly establishes that the Columbia data was *not* used in any way in the location of the CENTRAL AMERICA.

Mem. op. at 59 (E.D. Va. November 18, 1993). The Fourth Circuit affirmed this finding on appeal, 56 F.3d at 565-68, and this Court denied certiorari, 64 U.S.L.W. 3378.

Following the second trial in the *in rem* proceedings, Columbus-America moved for summary judgment in the still-pending Darlak suit. The district court reviewed the record in detail, and found that undisputed evidence established facts that bear little resemblance to those presented in Darlak's petition here. In short, the district court found that Darlak's own deposition testimony — notwithstanding his subsequent self-serving declarations filed in an effort to create factual issues — defeated his claims. *See* Pet. App. 10a-23a.

Most basically, undisputed evidence showed Darlak's claims that he established the Columbia Data search coordinates through his own efforts were simply ridiculous. Darlak omits these coordinates from the self-congratulatory narrative in the petition, and for good reason. The coordinates for the SS CENTRAL AMERICA that Darlak claims to have "discovered" — 77 10 West 31 25 North — were widely reported in newspapers of the day following the sinking of the SS CENTRAL AMERICA. These coordinates are also readily available in popular books on shipwrecks. *See, e.g.,* J. Potter, THE TREASURE DIVER'S GUIDE 487 (rev. ed. 1972); D. Horner, SHIPWRECKS, SKIN DIVERS, AND SUNKEN GOLD 73 (1965).

Darlak's claimed contributions to the Columbia survey effort also appear to have been delusional at best. The coordinate he claims to have provided for centering the survey — 77 West 31 30 North — was an established part of the Columbia search plan at least two weeks before Darlak (by his own admission) claimed he first mentioned them to anyone. *See* Pet. App. 17a-20a. Darlak's claimed role in the survey itself also bears no relation to reality. For example, his claims to have directed deployment of the sonar are belied by his own testimony, and his claim of ownership of the Columbia Data was wholly inconsistent with the actual evidence of

the voyage.[6] *Id.* at 19a-20a. In reality, Darlak went on the voyage without so much as an agreement from Grimm and John that he would be compensated. *Id.* at 17a.

The district court in its summary judgment decision summed up Darlak's case as follows:

> The claim of Darlak that the coordinates 77 West 31 30 North were suggested by him or are a result of any effort on his part, is clearly not true. This information was in the public domain long before Darlak was born. Furthermore, these coordinates had been written in the plan of the search area before Darlak became associated with the project.

Pet. App. 21a. The district court granted summary judgment to Columbus-America on this basis. Together with the decision in the *in rem* proceeding, the district court's review of the evidence establishes not only that Columbus-America never used the Columbia Data and that it would not have aided the search effort, but also that Darlak had no rights to the Columbia Data in the first place. Of course, each of these findings is independently fatal to Darlak's case.

On appeal, the Fourth Circuit affirmed the district court's dismissal of Darlak's claims on an alternative ground. The court of appeals acknowledged that there was a "good case to be made" that Darlak's claim was both unfounded and derivative of Grimm and John's. Pet. App. 6a. The court of appeals held, however, that under the

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[6] The evidence developed in the district court indicated that, notwithstanding Darlak's grandiose claims here, he spent much of the Columbia survey voyage seasick in his bunk.

facts presented, dismissal was also appropriate on the basis of the earlier findings in the Admiralty Action in light of Darlak's decision — following actual and constructive notice — that he would not intervene. Pet. App. 7a-9a.

REASONS FOR DENYING THE PETITION

The decision below presents no legal issue of any general significance. The Fourth Circuit's affirmance of the district court's ruling based on the unique facts of this case was manifestly correct, and does not merit review. The result below is in any event fully supported by the district court's grant of summary judgment on the alternative ground that undisputed evidence discredits petitioner's claim.

I. THE COURT OF APPEALS' FACT-BOUND DECISION PRESENTS NO ISSUE MERITING CERTIORARI REVIEW

Petitioner purports to raise a host of legal issues concerning application of res judicata and collateral estoppel principles in admiralty actions. Attempting to cast the Fourth Circuit's decision in stark terms, he contends that the opinion below stands for the proposition that the mere filing of an *in rem* action cuts off the ability of anyone from that point forward to file an *in personam* claim arising out of the same salvage effort. This is alleged to conflict with the basic principle that salvors under the Admiralty Rules have the option of choosing between *in rem* and *in personam* claims. *See* Pet. 19-23.

In reality, the Fourth Circuit merely addressed a peculiar set of facts deriving from Darlak's own attempts to game the system for his advantage. First, Darlak's claims against respondents required proof that they used

the Columbia Data — the very issue Darlak knew was pending before the district court in the Admiralty Action. Second, Darlak's whole involvement in the case came through his employers Grimm and John, with whom he entered into a written agreement governing his participation in the Admiralty Action. Third, Darlak twice deliberately chose not to intervene in the Admiralty Action despite having been prepared and even invited to do so.

Darlak cites no language from the Fourth Circuit's opinion holding as a general matter that those with claims arising from a salvage action cannot elect to proceed *in personam* as provided in the Admiralty Rules. The court of appeals' opinion contains no such holding. Darlak's contention that the opinion below conflicts with Supplemental Rule (C)(1), with this Court's opinion in *THE SABINE*, 101 U.S. 384 (1879), and with *Central Hudson Gas & Electric Corp. v. Empresa Naviear Santa, S.A.*, 56 F.3d 359 (2d Cir. 1995), is therefore without merit.[7]

No conflict is created with the general rule allowing salvors to choose between *in rem* and *in personam* remedies by the holding here: that a potential claimant with notice of an *in rem* action adjudicating an issue upon which his own claims rest may not participate in the action from the sidelines by virtue of a written agreement with a party, then start a whole new *in personam* suit if the

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[7] The makeweight "jurisdictional" issue raised in the petition is spurious. Despite the initial location of the shipwreck in international waters, the district court's jurisdiction in the Admiralty Action was established by the presence of the recovered *res* within the district as basic admiralty practice provides. Darlak cites no authority for the absurd contention that the location of the shipwreck means that the Admiralty Action "was not a true *in rem* action," Pet. 25, and therefore could not bind Darlak.

results of the first suit are not to his liking. Even the most minimal respect for judicial resources confirms the Fourth Circuit's holding that in these unusual circumstances Darlak "is not entitled to a bite of a different apple merely because he would not taste the first one." Pet. App.9a.

II. THE ALTERNATIVE GROUND OF DECISION BELOW MAKES REVIEW INAPPROPRIATE

Even if a certworthy issue were presented by the petition, review would still be inappropriate in light of the alternative ground for decision relied upon by the district court. *See, e.g.,* R. Stern, E. Gressman, *et al.*, SUPREME COURT PRACTICE 172-73 (7th ed. 1993) (even where case presents a conflict among courts of appeals, certiorari will not be granted where decision could be based upon an alternative ground). Assuming it were possible to imagine the Court granting certiorari and agreeing with every word of the petition, the district court's grant of summary judgment based on its review of the factual record provides an alternative ground of decision fully supporting the result below. This aspect of the case is sufficient in itself to mandate denial of certiorari.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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